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Supreme Court of the United States

OCTOBER TERM 1940

NO. 830

THOS. F. STEIN, JR.,
Petitioner,

vs.

STATE OF ALABAMA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

I

OPINIONS BELOW

The opinions of the Court of Appeals of Alabama and of the Supreme Court of Alabama in this case have not been reported in the official reports for the respective courts. The opinion of the Court of Appeals of Alabama may be found, however, reported in 199 Southern Reporter at page 11. The opinion of the Supreme Court of Alabama may be found in 199 Southern Reporter at page 13.

II

JURISDICTION

The jurisdiction of this Court is sought by this petition for writ of certiorari on the ground that the Supreme Court of Alabama has decided federal questions of substance not in accord with the applicable decisions of this Court. See Rule 38, 5(a) of this Court. We believe, however, that the federal questions of substance involved in this case have been decided in accord with the applicable decisions of this Court, and for that reason we submit this brief in opposition to the application for the writ of certiorari.

III

STATEMENT OF THE CASE

The statement of the case made in the Brief filed on behalf of petitioner in this case (pp. 6-8) is substantially correct and for that reason a further statement of the case is not made here.

It is conceded by the State that the judgment rendered by the Supreme Court of Alabama remanding this cause is a final judgment since the case was tried on an agreed statement of facts. See pages 11-13 of Brief on behalf of petitioner.

IV

SUMMARY OF ARGUMENT

The Legislature of the State of Alabama has imposed a privilege license on merchandise brokers

by the following provisions, found in General Acts of Alabama of 1935, pp. 256, 441, 442, 450.

> "Section 348. Every person, firm, company, corporation or association, receiver or trustee, but not a governmental subdivision, engaged in any business, vocation, occupation, calling or profession herein enumerated, or who shall exercise any privilege hereinafter described for which a license or privilege tax is required, shall first procure a State license, and a County license when so required, and shall pay for the same, or shall pay for the exercise of such privilege the amounts hereinafter provided and comply with all other provisions of this Act. * *
>
> "Schedule 29. For each commission merchant or merchandise broker in cities of fifty thousand inhabitants or over, fifty dollars ($50.00); in cities and towns of twenty-five thousand and less than fifty thousand inhabitants, thirty-five dollars ($35.00); in cities and towns of ten thousand and less than twenty-five thousand inhabitants, twenty-five dollars ($25.00); in cities and towns of five thousand and less than ten thousand inhabitants, fifteen dollars ($15.00); in cities and towns under five thousand inhabitants, whether incorporated or not, ten dollars ($10.00)."

The question presented to the courts of Alabama was whether petitioner was liable for this

privilege license in view of the fact that petitioner represented non-resident principals exclusively.

From the decision rendered by the Court of Appeals of Alabama in this case, it appears that this case was submitted in that court along with the case of *State v. W. M. Meador & Co. Inc.* This latter case has not been officially reported, but may be found reported in 198 Southern Reporter at page 163. It appears from the opinion of the Court of Appeals of Alabama in the case at bar (R. 12) that the facts are substantially the same in both cases, except that in the case of *State v. Stein*, the party defendant in the lower court represented non-resident principals exclusively. In the case of *State v. W. M. Meador & Co., Inc.*, the Court of Appeals of Alabama held that W. M. Meador & Co., was a "merchandise broker" within the meaning of the above quoted schedule of privilege licenses levied by the State of Alabama. Though the opinion by the Court of Appeals of Alabama, in the case of *State v. Stein* indicates a finding that Stein is not a "merchandise broker", no distinction is made between the business carried on by Stein and W. M. Meador & Co. The decision of the Supreme Court of Alabama in granting the writ of certiorari in the *Stein* case indicates that the decision of the Court of Appeals is disapproved wherein it was held that Stein was not liable for the license. Hence, we take it there can be no question but that Stein is subject to the privilege license levied by the above quoted schedule. The sole question for decision in this case is whether the so called "commerce clause" of the Federal Constitution, Article I,

Section 8, clause 3, shields petitioner from the imposition of the above quoted license.

The assignments of error urged in support of the writ of certiorari to this Court are to the effect that the Supreme Court of Alabama erred in its decision in this case in failing to hold that the petitioner was engaged in "interstate commerce" and in further holding that the non-discriminatory license imposed in this case could be levied on petitioner even if he were engaged in "interstate commerce".

In opposition to the application for the writ of certiorari, the State of Alabama insists that the Supreme Court of Alabama decided the federal questions of substance, namely, whether petitioner was engaged in "interstate commerce" and whether he was subject to the license herein imposed regardless of the nature of the business engaged in by him, in accord with the applicable decisions of this Court and in support of this contention maintains the following propositions of law:

1. The business of a merchandise broker regardless of the location of his principals is a local activity and is subject to local taxes.

Nathan v. Louisiana, 8 How. 73 (1850)
Williams v. Fears, 179 U. S. 270 (1900)
Ware & Leland v. Mobile County, 209 U. S. 405 (1908)

Hatch v. Reardon, 204 U. S. 152 (1907)
Brodnax v. Missouri, 219 U. S. 285 (1911)

Hopkins v. U. S., 171 U. S. 578 (1898)
Hill v. Wallace, 259 U. S. 44 (1922)
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Moore v. N. Y. Cotton Exchange, 270 U. S. 593 (1926)
Hemphill v. Orloff, 277 U. S. 537 (1928)
Dickson v. Uhlmann Grain Co., 288 U. S. 188 (1933)

See *Graniteville Mfg. Co. v. Query*, 283 U. S. 376 (1931)

Cf. *Ficklen v. Shelby County Taxing District*, 145 U. S. 1 (1892)
Robbins v. Shelby County Taxing District, 120 U. S. 489 (1887)
Crenshaw v. Arkansas, 227 U. S. 389 (1913)
Di Santo v. Pennsylvania, 273 U. S. 34 (1927)

Contra. *Stockard v. Morgan*, 185 U. S. 27 (1902)

2. Non-discriminatory licenses imposed in the buyer's state on those engaged in "interstate commerce" are not inconsistent with the congressional authority to regulate commerce among the several states.

Woodruff v. Parham, 8 Wall. 123 (1869)
Ficklen v. Shelby County Taxing District, 145 U. S. 1, (1892)

Graybar Electric Co. v. Curry, 238 Ala. 116 (1939) Aff'd 308 U. S. 513. Reh. Den. 308 U. S. 638

McGoldrick v. Berwind-White Coal Min. Co. 309 U. S. 33 (1940)

See: *Hinson v. Lott*, 8 Wall. 148 (1869)

Western Live Stock v. Bureau, 303 U. S. 250 (1938)

V

ARGUMENT

Proposition of Law 1

THE BUSINESS OF A MERCHANDISE BROKER REGARDLESS OF THE LOCATION OF HIS PRINCIPALS IS A LOCAL ACTIVITY AND IS SUBJECT TO LOCAL TAXES.

As appears from the agreed statement of facts (R. 5-7), Thomas F. Stein, Jr., the petitioner, is engaged in business for himself in the City of Mobile, Alabama, a city of over 50,000 population. He advertises himself as a merchandise broker. The exact manner in which he does business is to solicit orders in the City of Mobile, for the purchase of merchandise. When petitioner procures an order for merchandise, he then transmits the order to the seller located without the territorial limits of the State of Alabama. This terminates the business activities of petitioner. Whether the order is accepted and the goods are thereafter shipped di-

rectly to the purchaser in Mobile, or whether the order is rejected, are matters over which petitioner has no control. Petitioner does not ship any goods from one state to another, nor does he order such goods, except for the account of a third party, namely, the buyer. Petitioner is merely a mode of communication between the buyer in Mobile and the seller without the state. The business activities of petitioner cease, however, as soon as the order is transmitted. Thus, the occupation on which the privilege license is imposed has its inception and termination within the State of Alabama.

This Court has held that such activities are so local in their nature as not to constitute "interstate commerce" and hence are subject to local taxation. In the case of *Nathan v. Louisiana*, 8 How. 73 (1850) it appears that the State of Louisiana sought to impose a privilege license upon "each and every money or exchange broker". On page 80 of the opinion rendered by Mr. Justice McLean for the Court, it is stated:

> "Money is admitted to be an instrument of commerce, and so is a bill of exchange; and upon this ground, it is insisted that a tax upon an exchange broker is a tax upon the instruments of commerce."

In reply to this argument it was stated on page 81:

> "The dealer in bills of exchange requires capital and credit. * * * He is not engaged in commerce, but in supplying an instrument of

commerce. He is less connected with it than the ship-builder, without whose labor foreign commerce could not be carried on."

Cf. *Ficklen v. Shelby County Taxing District*, 145 U. S. 1 (1892).

This Court has followed this construction of the nature of the business done by brokers in many cases. Thus local privilege licenses have been sustained when applied to emigrant labor agents,

Williams v. Fears, 179 U. S. 270 (1900)

and cotton futures brokers

Ware & Leland v. Mobile County, 209 U. S. 405 (1908).

So local taxes on sales or transfers made by stock brokers have been sustained.

Hatch v. Reardon, 204 U. S. 152 (1907)

Brodnax v. Missouri, 219 U. S. 285 (1911)

See: *Graniteville Mfg. Co. v. Query*, 283 U. S. 376 (1931)

This same principle has also been applied where federal regulations have been sought to be imposed upon those occupying the position of brokers and this Court has held that since the broker's business is local in character, Congress did not have authority to regulate such business under the "commerce clause".

Hopkins v. U. S. 171 U. S. 578 (1898).

Hill v. Wallace, 259 U. S. 44 (1922).

The converse has been recognized where states have sought to regulate those in the position of brokers.

Engel v. O'Malley, 219 U. S. 128 (1911)

Hall v. Geiger-Jones Co. 242 U. S. 539 (1917)

This Court has further held that civil actions under the federal anti-trust laws did not lie with reference to those in similar businesses on the ground that Congress did not have the authority to legislation concerning them under the "commerce clause".

Blumenstock Bros. Adv. Co. v. Curtis Pub. Co. 252 U. S. 436 (1920)
Moore v. N. Y. Cotton Exchange, 270 U. S. 593 (1926)

The validity of the contract between the broker and the local buyer is determined by the law of the state where such contract is executed.

Hemphill v. Orloff, 277 U. S. 537 (1928)
Dickson v. Uhlmann Grain Co. 288 U. S. 188 (1933)[1]

The contrary is maintained by petitioner, chiefly relying on language found in certain distinguishable cases. As stated by Mr. Justice Stone writing for the Court in the case of *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U. S. 33, 50 (1940), these general statements "are inapplicable here because they are torn from their setting in judicial opinions and speak of state regulations or taxes of a different kind laid in different circumstances from those with which we are now concerned."

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[1] Compare the cases holding that the formation of insurance contracts even between residents and non-residents do not constitute "interstate commerce".

Paul v. Virginia, 8 Wall. 168 (1869)
Hooper v. California, 155 U. S. 648 (1895)
New York Life Ins. Co. v. Deer Lodge County, 231 U. S. 495 (1913)

The case of *Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887) involves a discriminatory license[2] imposed on a non-resident seeking to distribute the wares of his employer in Tennessee. This is a far cry from imposing a license on a resident of the state for local activities, hence any language in that case cannot be considered as authoritative in a case such as the one at bar.

The case of *Crenshaw v. Arkansas*, 227 U. S. 389 (1913) involves a non-resident distributing his goods by salesman (employee). Certainly language in the opinion of the Court in this case could not be considered precedent in determining the nature of an independent contractor's business.

The case of *Di Santo v. Pennsylvania*, 273 U. S. 34 (1927) involves a ticket broker, but the tickets were for foreign transportation exclusively and the regulation in question was a police regulation rather than a tax. Furthermore, there was a very powerful dissent by Mr. Justice Stone, Mr. Justice Holmes and Mr. Justice Brandeis.

We admit that this Court has decided adversely to the contention here made by the State of Alabama in the case of *Stockard v. Morgan*, 185 U. S. 27 (1902.) We believe, however, that that case was inadequately considered and is unsound and in view of the cases cited above, we believe the Supreme Court of Alabama correctly refused to follow it.

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[2] See *McGoldrick v. Berwind-White Coal Mining Co.*, *supra*, 55, 56. Whether any life is left in the *Robbins* case is a much mooted question in the Supreme Court of Alabama after the remarks of Mr. Justice Stone concerning this case on pages 56, 57 of 309 U. S.

Proposition of Law 2

NON-DISCRIMINATORY LICENSES IMPOSED IN THE BUYER'S STATE ON THOSE ENGAGED IN "INTERSTATE COMMERCE" ARE NOT INCONSISTENT WITH THE CONGRESSIONAL AUTHORITY TO REGULATE COMMECE AMONG THE SEVERAL STATES.

The privilege license imposed by schedule 29 of section 348 of the Revenue Act of Alabama of 1935, *supra*, applies regardless of whether "interstate commerce" is or is not engaged in. In other words, the license is not imposed because of, or in consequence of brokers in Alabama engaging in "interstate commerce".[3] It is further to be observed that the privilege license sought to be imposed in the case at bar is imposed in the state wherein the buyer of the goods resides. A non-discriminatory license imposed on the privilege of doing business in the state wherein the seller resides might be subject to criticism because of the fact that the goods sold might be subject to multiple burdens in case the state through which the goods were transported, or the state to which they came to rest imposed additional licenses.[4] This possibility of multiple burdens is completely eliminated when the tax is sought to be imposed in the buyer's state.

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[3] *Cf. Robbins v. Shelby County Taxing District*, 120 U. S. 489 (1887). *Best & Co. v. Maxwell*,—U. S.—, 85 L. ed. (Adv. Sheets 1941) 274.

[4] See *Adams Mfg. Co. v. Storen*, 304 U. S. 307 (1938). *Gwin, White & Prince, Inc. v. Henneford*, 305 U. S. 434 (1939).

In the second place, the relationship of master and servant, or employer and employee, does not exist in this case between the non-resident seller and the petitioner. Though petitioner is an agent for both the resident buyer and the non-resident seller, he is not that type agent whose acts would generally bind his respective principals. Thus, the non-resident seller would not be responsible for any torts committed or contracts executed by petitioner (R. 6). Neither would the resident buyer be responsible for any actions of petitioner except within a very narrow and limited scope. In law and in fact, petitioner is an independent contractor in Mobile County, Alabama, engaged in the brokerage business.[5]

Any licenses imposed upon petitioner for the privilege of engaging in the brokerage business in Mobile County, Alabama, does not strike the non-resident seller. Even if petitioner were put out of business, it would not mean that the non-resident seller would be unable to distribute his wares into this state. The non-resident seller could introduce and distribute his goods into this state in person, by agent or employee, or otherwise. A prohibition directed at non-resident sellers or their employees or servants might injuriously affect the free flow of commodities between states. It does not follow, however, that such a prohibition directed against brokers within the state would have the same result. *A fortiori* a non-discriminatory privilege license im-

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[5] See I Restatement of Agency Sec. 1d, 2b.

posed on brokers within the state will not impede the free flow of commerce among the several states.

The pertinent provision in the Federal Constitution claimed to exempt petitioner from the license in this case is that "The Congress shall have the Power * * * to regulate Commerce with foreign Nations, and among the several states, * *". Unless the license sought to be imposed in this case is inconsistent with the congressional power to regulate commerce[6] then there can be no objection to the license.

Assuming that the imposition of privilege licenses for state purposes does regulate commerce[7] the question then is whether those engaged in "interstate commerce" are thereby immune from all state privilege licenses.

As noted above, the license imposed in this case is non-discriminatory. This Court has held that one in the position of a commission merchant (receiving the possession of goods sold for non-resident principal)[8] was subject to a non-discriminatory license. *Woodruff v. Parham*, 8 Wall. 123 (1869). See also *Hinson v. Lott*, 8 Wall. 148 (1869). A non-

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[6] See *Bacon v. Illinois*, 227 U. S. 504, 516 (1913)
Minnesota v. Blasius, 290 U. S. 1, 8 (1933)
McGoldrick v. Berwind-White Coal Mining Co., 309 U. S. 33, 45 (1940)

[7] *Cf., McGoldrick v. Berwind-White Coal Min. Co., supra*, 45, where Mr. Justice Stone says: "In imposing taxes for state purposes a state is not exercising any power which the Constitution has conferred upon Congress."

[8] See *Slack v. Tucker & Co.*, 23 Wall. 321, 330 (1874)

discriminatory privilege license imposed upon a broker in the buyer's state, exactly like the case at bar, was held good in the case of *Ficklen v. Shelby County Taxing District*, 145 U. S. 1 (1892).

The doctrine that non-discriminatory licenses may be imposed in the buyer's state has been affirmed by this Court in the cases of *McGoldrick v. Berwind-White Coal Mining Co., supra; Graybar Elec. Co. v. Curry*, 238 Ala. 116 (1939) Aff'd 308 U. S. 513, Reh. Den. 308 U. S. 638. See also *Western Live Stock v. Bureau*, 303 U. S. 250 (1938).

Therefore, even if it be admitted that petitioner is engaged in "interstate commerce" and conceding that the imposition of privilege licenses can usurp the congressional authority to regulate commerce among the several states, nevertheless, non-discriminatory licenses imposed in the buyer's state do not infringe on this congressional power.

VI

CONCLUSION

Since a merchandise broker representing non-resident principals exclusively is engaged in a local business subject to local taxation, the Supreme Court of Alabama correctly held petitioner subject to the privilege license imposed by schedule 29 of section 348 of the Revenue Act of Alabama of 1935, quoted above. Even if it should be held that petitioner is engaged in "interstate commerce" nevertheless petitioner is not shielded from the privilege license

sought to be imposed in this case since the license is a non-discriminatory license and is imposed in the buyer's state. Therefore, the Supreme Court of Alabama has not decided a federal question of substance contrary to the applicable decisions of this Court, but on the other hand, has decided such question in line with the decisions of this Court, hence the application for the writ of certiorari in this case should be denied.

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